Petition

81-1153

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DOUGLAS JEROME TOOKES,
Petitioner,

vs.

THE STATE OF GEORGIA,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS
OF GEORGIA

PETITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals of Georgia erroneously uphold the wiretap warrant below in view of the requirement of *Spinelli v. U.S.*, 393 U.S. 410, 89 S.Ct. 584, 21 L.E. 2d 637 (1969), and its progeny, that alleged probable cause for a search warrant be factually specific and not be based upon conclusions, suspicions, innocuous observations and stale information, in violation of Petitioner's Fourth Amendment rights?
2. Did the Court of Appeals of Georgia erroneously affirm the refusal of the trial court to listen to the wiretap recordings in order to make the objective assessment of intercepting officers' alleged minimization efforts as required by *Scott v. U.S.*, 436 U.S. 128(1), 98 S.Ct. 1717, 56 L.E. 2d 168 (1978), in violation of Petitioner's Fourth Amendment rights?
3. Did the Court of Appeals of Georgia erroneously affirm the trial court's failure to provide notice or hearing to Petitioner regarding a note given privately to the trial judge by a juror suggesting bias on his part, in violation of Petitioner's due process rights under the 14th Amendment?
4. Did the Court of Appeals of Georgia err in holding the evidence to be sufficient in the light of the rational trier of fact standard of *Jackson v. Va.*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E. 2d 560 (1979), in violation of Petitioner's 14th Amendment due process rights?

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OPINION BELOW

The judgment of the Court of Appeals of Georgia is reported at 159 Ga. App. 423 (1981) and is set out on pages 1a-9a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on July 15, 1981. Timely Motion for Rehearing was denied on July 31, 1981. Timely Application to the Georgia Supreme Court for the Writ of Certiorari was denied on October 8, 1981. Timely Motion for Reconsideration was denied on October 20, 1981. The jurisdiction of this Court is invoked under 28 USC Sec. 1257(3) and United States Supreme Court Rule 17.1(C), 28 USC.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the Constitution of the United States, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted with nine others in one count for alleged conspiracy and alleged attempt to violate the Georgia Controlled Substances Act under *Ga. Code Section* 79-A-812 (R-3), and was tried with four others.

Based upon alleged probable cause in an Affidavit (T-2245 f.) (Appendix B) which Petitioner considers to be riddled with constitutionally worthless bald assertions of suspicions, conclusions, innocuous observations, stale information and falsehood, a wiretap warrant and extension warrant (T-2254 f., 2257 f.) had issued for telephones

of people other than Petitioner, at a house where Petitioner did not live, and as a result, massive interceptions and recordings were made (T-194) of substantially unintelligible conversations, a substantial quantity of which Petitioner insists consisted of irrelevant and non-minimized personal conversations, to the extent decipherable (T-207), from which copies of excerpts were patched together by the District Attorney, (T-194-199) and, over objection, (T-625, 1479, 1483) were allowed into evidence, after the trial court refused to consider the evidence of failure to minimize (T-624, 625). In several of these conversations, all of which are of highly questionable intelligibility (T-1834), and which the Court Reporter considered substantially unintelligible, officers said that one voice was that of Petitioner (T-1624, 1625, 1633, 1634, 1648, 1705, 1719, 1734, 1735, 1740, 1746, 1760, and 1823). Upon these voice identifications, only 3 of which were alleged in the Indictment, and in 2 of which the other alleged party was acquitted of the indicted charge (R-3) (T-2233), and without any drug being found at the surveilled house (T-1235) or in any way connected to Petitioner (T-1881), he was found guilty under *Georgia Code Section* 79-A-812, which does not define a crime (R-40-44) and by a jury which contained a member who expressed privately to the trial judge a bias toward the Defense side, about which Petitioner was given neither notice nor hearing. (R-88-89), (Supp. T-1-7, 21-23, 25, 26). Petitioner was sentenced to 20 years to serve (R-85).

Prior to trial Petitioner filed a Motion to Suppress the wiretap evidence, on the grounds that there was not probable cause for the issuance of the Investigation Warrant or Extension Warrant and that they were illegally executed and the conversations were unlawfully intercepted

because of substantial and massive failure of monitoring officers to minimize the interception of personal and private irrelevant conversations (R-72). The trial court denied the Motion (T-588). In Petitioner's Enumeration of Errors in the Court of Appeals of Georgia the denial of the probable cause aspect of the Motion to Suppress was Petitioner's "Enumeration 1" and the denial of the minimization aspect of the Motion to Suppress was Petitioner's "Enumeration 2". The rulings by the Court of Appeals of Georgia on these two issues were in Divisions "1" and "2" of the Opinion of the Court below, as reflected in Appendix "A".

Prior to trial Petitioner demurred to the Indictment (R-40, 44) on the ground, among others, that it failed to charge an offense, since it was explicitly based upon *Georgia Code Section* 79-A-812, which does not define an offense but only prescribes punishment for other offenses. The trial court overruled the demurrer (T-47). The point was renewed by Motion in Arrest of Judgment (R-90) which was overruled (R-101). This issue was raised by Petitioner on appeal in "Enumeration 4", and was supposedly ruled on in Division "4" of the Opinion of the Court of Appeals of Georgia, as reflected in Appendix "A".

Petitioner moved the trial court for a directed verdict of acquittal (T-1838) which was denied (T-1840). In his appeal Petitioner raised this issue as "Enumeration 10" on the basis of the denial of the motion for directed verdict and on the basis of the general grounds in the light of the "Rational Trier of Fact" standard. The Court of Appeals of Georgia ruled on this issue in Division "8" of its Opinion, as reflected in Appendix "A".

After Petitioner's appeal was filed to the Court of Appeals of Georgia, his Counsel discovered the private

message from the juror to the trial judge, about which neither Petitioner nor Counsel had received either notice or hearing. This isue was raised in "Enumeration 11" and was ruled on by the Court of Appeals of Georgia in Division "9" of the Opinion, as reflected in Appendix "A".

REASONS WHY THE WRIT SHOULD BE GRANTED

Among many errors of the Trial Court, affirmed by the Court of Appeals of Georgia and for the correction of which the Supreme Court of Georgia denied the Application for the Writ of Certiorari, are 4 federal constitutional questions which the Georgia Courts have decided in ways which conflict with applicable decisions of this Court.

1. THE BASIS FOR THE WIRETAP WARRANT WAS DEVOID OF PROBABLE CAUSE

Petitioner respectfully submits that the Court of Appeals of Georgia, in Division I of its Opinion, has erroneously decided a basic federal question in a way in utter conflict with the controlling authority of the case of *Spinelli v. U.S.*, 393 U.S. 410, 89 S.Ct. 584, 21 L.E.2d 637 (1969), and its progeny, such as *Cain v. State*, 128 Ga. App. 146 (1973); *Sams v. State*, 121 Ga. App. 46 (1970); *Bell v. State*, 128 Ga. App. 426 (1973); *Mahar v. State*, 137 Ga. App. 116 (1975); *Fowler v. State*, 121 Ga. App. 22 (1970); et al., which require that alleged probable cause in a Search Warrant Affidavit show with factual specificity the informant's reliability and show with factual specificity how the informant obtained his information or describe the accused's criminal activity in sufficient factual detail so that the issuing judge may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

In order to separate the wheat from the chaff, *Spinelli, supra,* et al., thresh out as worthless, bald assertions of suspicions, conclusions, prejudices of police officers, innocuous observations and stale information.

This Court's language in *Spinelli, supra,* fits the instant case remarkably. In *Spinelli,* the defendant was convicted of illegal gambling activities. The search warrant had been granted on the basis of an FBI agent's affidavit alleging that: (1) The defendant had traveled to and from the apartment building, had parked his car there, and had entered one of the apartments; (2) The apartment contained two telephones, having different numbers, which were listed in the name of a person other than the defendant; (3) The defendant was "known" to the affiant and to other law-enforcement officers as a bookmaker and gambler; and (4) A "reliable informant" had informed the FBI that the defendant was operating a handbook and accepting wagers and was disseminating wagering information by means of the two telephones.

In *Spinelli,* this Court emphasized that the allegation that a person was known to the affiant and other officers as a gambler and associate of gamblers was merely a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision as to whether probable cause existed. The Court insisted that conclusions without factual support are worthless and that probable cause must be determined by a neutral and detached magistrate, and not by the officer engaged in the often competitive enterprise of ferreting out crime.

In the instant case, the Affidavit begins with the bald conclusional assertion: "Affiant states that he has received information from a confidential and reliable informant that Emma Lou Smith, Larry Thomas, Douglas

Jerome Tookes, Margaret Gail Wise, a/k/a Margaret Wise Bennett, Stephaney Dyer and other unknown persons are engaged in an illegal drug trafficking operation, in violation of the Georgia Controlled Substances Act." (T-2245) This is worthless under *Spinelli*. Incidentally, it is interesting that neither Smith nor Thomas was indicted.

In regard to the first prong of the "*Spinelli Test*," relating to the reliability of the informant, the Affidavit offers a semblance of compliance by referring in general terms to past information but does not really provide any factual details that the issuing judge can evaluate without relying on the conclusions of the Affiant. Neither is recent time mentioned. (T-2246)

However, the Affidavit totally fails the test of the second prong of the "*Spinelli Criteria*."

The Affidavit says: "Your Affiant states the the (sic) said confidential informant, told your Affiant that a person known as Douglas Jerome Tookes a/k/a Doug Tookes, runs a 'drug house' ". (T-2246) This bald assertion is *even less reliable* than the worthless assertion that Spinelli was "known" to the Affiant FBI Agent and other law enforcement officers as a bookmaker and gambler.

The Affidavit describes the house (T-2246) but this is as innocent as the references in the Spinnelli Affidavit to the apartment building.

The Affidavit asserts: "This informant told your Affiant that Doug Tookes deals out of the house at 261 Elm Street, N.W., but that he deals only to his runners." (T-2246) There is nothing in support of this bald assertion. No facts are given. It does not say that the informant was ever there; that he ever saw Mr. Tookes sell,

buy, possess, supervise, help, be present, or do anything. There is no indication of first hand perception by the informant or receipt from some other source shown to be reliable. This assertion is as worthless as the allegation in the Spinelli Affidavit that the "reliable informant" had informed the FBI that the defendant was operating a handbook, accepting wagers and disseminating wagering information by means of two telephones.

The Affidavit says that Mr. Tookes does not live at the house at 261 Elm Street. (T-2246). That certainly does not bolster any alleged probable cause regarding Appellant.

The further statement that Stephaney Dyer lives there and sells drugs is a mere unsupported conclusion. (T-2246) There is no mention of the informant ever seeing this or being present to perceive it in any way, at any time.

Furthermore, in the above assertions of the Affidavit, there is no mention of any time frame or means of perception.

The Affidavit asserts: "The said informant told your Affiant that unless the potential drug buyer parks his car out of sight of the house at 261 Elm Street, N.W., Tookes will not sell the drugs." (T-2247) This mere conclusion provides no factual data as to how the informant claims to know this. It fails to say if or when he ever saw, heard, smelled or otherwise perceived such activities. This bald assertion is as worthless as the assertions in the "*Spinelli Affidavit*" that the defendant was operating a handbook, accepting wagers and disseminating wagering information by means of the two telephones.

The Affidavit next asserts: "The said informant has told your Affiant that Margaret Gail Wise is one of Doug

Tookes' 'runners' ". (T-2247) It fails to say he ever saw her "run", sell or possess in connection with Mr. Tookes. It does not say he ever saw her with Mr. Tookes or heard her talk to him. It does not assert that he ever saw her in the house.

The Affidavit further says: "The said informant told your Affiant that Margaret Wise told him that the phone number called by her to set up drug buys was 588-1396 and that that phone was 261 Elm Street, N.W. The informant said that there was another phone number at 261 Elm Street, N.W., also." (T-2247)

The only thing approaching factual specificity here is that the informant reportedly said that Bennett told him. There is no mention of her reliability or how she obtained the information. There is no mention of the time when these things were supposed to be true, the time when Bennett allegedly knew them to be true, the time when Bennett allegedly told the informant, or the time when the informant allegedly told the Affiant.

Next, the Affidavit asserts: "The said informant told your Affiant that Tookes goes to New York to buy drugs and that he delivers the drugs to 261 Elm Street, N.W." (T-2247) There is no claim that the informant ever saw this; that he ever went with him; that he ever saw a plane ticket; that he ever was told by Mr. Tookes or anyone else that such a thing happened; or that any of these alleged activities occurred in 1980, 1970, 1960 or at any other specified time. The informant could just as easily have said that the District Attorney, or Superior Court Judge, the Governor or anyone else went to New York and bought illicit drugs to resell.

Therefore, all of the information attributed to what the informant said is devoid of the requisite factual specificity

and is worthless to establish probable cause.

The Affidavit next offers pretended evidence under the label of "Physical Surveillance". It says: "Your Affiant states that Douglas Jerome Tookes has been known to be dealing in illegal drugs since 1972, or 1973". (T-2247) There is no claim of any prior drug conviction. *Indeed,* there is none. (ST-5-6) No attempt is made to provide any factual basis for this bald assertion. It is as deficient as the statements in the "*Spinelli Affidavit*" that the defendant was "known" to the Affiant and to other officers as a bookmaker and gambler.

The Affidavit then tells about two small drug buys on November 13 and 29, of 1978, by an Officer Carter. (T-2247) It says that on the November 13, 1978 incident that a bag of heroin was bought for $50.00 from "one of Doug Tookes 'Runners' ". No more factual basis is shown of a connection with Mr. Tookes than is shown of a connection with the Governor, the President or the District Attorney, for example. No connection is ever shown with the house in question, except that the incident is alleged to have occurred in the same neighborhood. The alleged "runner" is not identified.

The Affidavit then proceeds to relate an incident on November 29, 1978, of similar quality. The alleged "runner" is unidentified. No factual connection is shown to Mr. Tookes or the house. The only additional ingredient is the assertion: "The runner told Officer Carter he could get some from 'Doug' but that he had to call first." There is no factual showing that the reference to "Doug" even refers to Mr. Tookes, or if it did, whether it were believable or not. There is no showing of any reliability of the alleged "runner" or as to how he would know of any connection with Mr. Tookes.

Moreover, this information which was a year and a half old was unquestionably stale.

Interspersed with 3 alleged incidents of buys which will be dealt with hereafter, the Affiant inserts an innocuous paragraph of one day when no drug possession or sale or any suspicious activity is alleged, and says that Mr. Tookes was there, refused to talk with the officers and had a car parked on the street which was impounded by the officers. (T-2248) Nothing was seized from the car and Mr. Tookes was not arrested. This information is as innocuous and useless for probable cause purposes as the information in the "*Spinelli Affidavit*" that Spinelli drove to and from the apartment building, parked his car there, and entered one of the apartments.

There is a reference to a "locked burglar bar door" but officers admitted in testimony that such doors are not uncommon in that neighborhood or the city of Atlanta. (T-962, 1530)

The Affidavit goes on to say that Mr. Tookes owns Mid-Town Auto Sales and that cars registered to the same are often seen at 261 Elm Street and at Mr. Tookes' residence at 2594 Williamsburg Drive, Decatur, Georgia. (T-2249) This tells the issuing Judge that Mr. Tookes actually lives a long way from the house in question and that cars from his car lot are seen at his home. This is hardly incriminating. It goes on to say that some cars from his lot are also seen at the Elm Street house. No factual showing is attempted of who saw this, when it was seen, how the observer knew that any car was registered to the auto company, or if any impropriety was occurring at the time on Elm Street.

The Affidavit goes on to say that the two phone numbers at 261 Elm Street are listed to Emma Lou Smith

and to Larry Thomas, respectively. (T-2249) This shows no connection with Mr. Tookes.

In addition, the Affidavit shows no probable cause regarding these persons to whom the phones are listed. This also is a material defect. See *U.S. v. Vega*, 52, F.R.D. 503 (D.C. N.Y. 1971).

Moreover, there is no showing of probable cause that Mr. Tookes would use the phones in question. See *U.S. v. Curreri*, 368 F.Supp. 757 (D.C. Md. 1973). *U.S. v. Bleau*, 363 F.Supp. 438 (D.C. Md. 1973).

The assertion in the Affidavit that in October, 1979, calls on both phones were made to a number in Athens, Ga. is not incriminating.

The next Affidavit statement ostensibly is designed to emit a sinister connotation, but upon analysis is equally void. The Affiant states that calls have been made to a New York City phone number that is "listed to an S. Santana and your affiant has information that the Santana family in New York is known to traffic heroin." (T-2249) The illogic and the total factual emptiness of this statement are patent. Who knows if the Santanas to whom the number is listed have ever even heard of anyone by the same last name who, according to unsupported rumor, has some vague alleged drug involvement? What source does this bald assertion come from? What is the reliability of the source? How does the source know? Is the issuing Judge to assume that anyone in New York with a non-Anglo-Saxon name is sinister?

The assertion, that the number called in Athens, Ga. (404-549-1851) was a public telephone, was false. See Defendant Tookes' Exhibits 1 and 2 (T-2327, 2328).

Affidavits containing misrepresentations are invalid if

there is intent to deceive the magistrate. *U.S. v. Hyde*, 574, E.2d 856 (5th Cir. Fla. 1978).

An order based on an affidavit sufficient on its face may be invalidated if it contains misrepresentations of fact. *U.S. v. Baynes*, 400 F. Supp. 285, affirmed 517 F.2d 1399 (D.C. Pa. 1975).

The suggestion of factual specificity attempted in the next paragraph also fails to meet the test. (T-2249) The references to a search on March 31, 1978, and to a 1974 phone bill are patently stale. The officer is unidentified. It mentions contraband, marijuana and drug paraphernalia. No quantity is mentioned. Surely, no heroin or cocaine was involved, since they are not mentioned and those are the drugs which this case is supposed to be about. There is no mention of any incriminating involvement or presence by Mr. Tookes or any other defendant herein. There is no help in establishing the necessary probable cause for the wiretap warrant.

The total failure of the Affidavit to meet the second prong of the "*Spinelli Test*" is illustrated by the fact that the sum and substance of alleged probable cause in the Affidavit of how the informant obtained his information consists of three alleged buys on three alleged occasions of one small bag of Heroin by Det. Holloway and the informant from Margaret Gail Wise, a/k/a Bennett, after Wise had walked to the Elm Street house.

The Court below says: "Also, sufficient basis for the informant's knowledge in the present case was indicated by the fact that the informant worked closely with the police in making a controlled purchase of narcotics". (Page 2 of Opinion) The Court goes on to refer to how the alleged drug operation was conducted, according to the informant. However, the Court overlooked the fact

that all of that information of allegedly how the operation was conducted was purely conclusional. No facts were given to support this bald assertion. The Affidavit fails to say that the informant was even there; that he ever saw Mr. Tookes or anybody sell, buy, possess, supervise, help or do anything. There is no indication of first hand perception by the informant or receipt from some other source shown to be reliable.

The Court below says that the informant contacted a "Runner". Actually, the Affidavit just asserts that Wise was a Runner. (T-2249)

The Court below bases its holding that the second prong of the "*Spinelli Test*" is met, of showing how the informant obtained his information, by the three (3) alleged instances of contact with Wise on January 1, 1980, February 21, 1980 and March 18, 1980. (T-2248) (Appendix 4b, 5b)

The Court below says: "The informant, working with police detectives, contacted a Runner. On each of three occasions the Runner placed a telephone call and then walked to the Elm Street address and returned with Heroin. This information was quite detailed and any risk of falsehood of the informant's story was sufficiently diminished by the police corroboration which in the present case was sufficient to establish probable cause."

Upon close analysis these three assertions in the Affidavit failed to show probable cause for any wiretap. The only evidence that was presented in this alleged probable cause, above the level of suspicion, would point only toward Wise and the informant. In regard to the Elm Street house, at best, such assertions as are contained in the Affidavit raise only a suspicion. As to Petitioner they show absolutely no basis for any sort of invasion of pri-

vacy by wiretap or otherwise.

The information regarding the alleged January 1, 1980, occurrence has the following defects: For the Affidavit made on March 21, 1980, as a basis for the Investigation Warrant, the information about one bag of Heroin 2 and 3/4 months earlier is manifestly stale. The assertion that Wise called a telephone at Elm Street is purely conclusional. It fails to say that Holloway or the informant actually knew where Wise called. On the trial, in fact, Holloway admitted that he did not know what number was called on that occasion. (T-1029) Furthermore it was later revealed that the alleged January 1, 1980, buy did *not* occur at all and that this key paragraph of the Affidavit which was a substantial part of the claimed probable cause was in fact false in a very material respect. See Holloway's testimony (T-1019 through 1022, 1028 through 1031) and Bennett's testimony. (T-1947 to 1948) This false material assertion, which is of the heart of the claimed probable cause, alone should vitiate the Investigation Warrant. See *U.S. v. Thomas*, 489 F.2d 664, 669 (5th Cir. 1973); *Lee v. State*, 239 Ga. 769, 773 (3) (1977); *Geiger v. State*, 129 Ga. App. 488, 492 (1) (1973).

The information regarding the alleged February 21, 1980 occurrence involving one small bag of Heroin, in all fairness, is stale for purposes of a Wiretap Warrant a full month later. Moreover, this assertion which was highly material to the claim of probable cause contained falsehood. The Affidavit claims that Wise went in the Elm Street house. In fact, Holloway later testified that he was 50 to 60 yards away without binoculars (T-974) and did not see Wise go into the house but merely saw an unidentified hand come through a hole in the screen (T-971). He also testified that at the time he was driving his car

away and turning around. (T-975)

The only specific incident which even approaches being fresh is the March 18, 1980 occurrence, which is still three days before the Affidavit. This paragraph does not even claim that Wise entered the house on this occasion. The fact that Wise was in the area of the Elm Street house and returned with one tiny bag of Heroin which she easily could have concealed on her person ahead of time and which she, in fact, testified she had actually received from the informant at her house (T-1931) certainly fails to provide probable cause for a wiretap warrant issued for telephones at the Elm Street house. In view of the small and easily transportable quantity of Heroin involved, even if this one tiny bag had come from the Elm Street house, it certainly does not justify a reasonable belief that Heroin would be at the Elm Street house on March 21, 1980, or that conversations would be transpiring over telephones at the said house pertaining to any sort of substantial drug operation as would justify an electronic surveillance warrant. See *Fowler v. State*, 121 Ga. App. 22 (1970).

Among the worthless bald conclusions is a false summary perspective with very deceptive connotations. Affiant suggests that Mr. Tookes was virtually "holed-up" at 261 Elm Street and inaccessible to arrest. (T-2251) The officers later testified that Mr. Tookes was readily accessible at his business and elsewhere. (T-1868-1883; 1524, 5)

Therefore, the entire electronic surveillance was ordered by an Investigation Warrant that rested upon an Affidavit that is absolutely and unquestionably a miserable failure, worthless and void under the constitutional standards required by the *Spinelli* decision, *supra*, and its progeny in Georgia and elsewhere. Hence, the trial court committed harmful error in denying Petitioner's

Motion to Suppress the wiretap evidence and the Court of Appeals of Georgia has compounded the error by affirming the trial court. The Affidavit appears on pages 1b-11b of the Appendix. Petitioner shows on pages 1c-11c of the Appendix a graphic illustration of the tattered and inadequate nature of the Affidavit when the worthless material is excised by the razor of the "*Spinelli Test*".

2. THE COURT BELOW ERRONEOUSLY AFFIRMED THE EXPLICIT REFUSAL OF THE TRIAL COURT TO LISTEN TO THE WIRETAP RECORDINGS IN ORDER OBJECTIVELY TO ASSESS THE INTERCEPTING OFFICERS' ACTIONS ON THE ISSUE OF MINIMIZATION.

As part of the Petitioner's pre-trial Motion to Suppress (R-72), he showed unconstitutional execution in flagrant failure to minimize the interception and recordation of irrelevant personal conversations.

The Constitutional test of whether or not the minimization requirement has been violated is set forth by this Court in the case of *Scott v. U.S.*, 436 U.S. 128, 129(1), 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978):

> 1. The proper approach for evaluating compliance with the minimization requirement, like evaluation of all alleged violations of the Fourth Amendment, is *objectively* to assess the agent's or officer's actions in light of the facts and circumstances confronting him at the time without regard to his underlying intent or motive. (Emphasis supplied)

The Court of Appeals of Georgia has previously shown a lucid grasp of *Scott, supra*, and in a thorough and superb analysis, in application of the principles to Georgia, concluded:

> We conclude that there are two types of violations of

> the minimization requirements. The first type would be blanket intercept of the entire conversation of all calls and would be a blatant violation of the provisions of 18 U.S.C. 2518(5) and the Fourth Amendment, *United States v. Focarile*, 340 F.Supp. 1033, *supra*, 1046. The second type of violation would be committed if an inadequate method or effort were utilized to minimize intercepts of nonpertinent calls. *Morrow v. State*, 147 Ga. App. 395, 406 (1978).

In the instant case the surveillance officers testified with considerable confusion and contradiction about the minimization issue. A summary of the material excerpts is set forth on pages 1d-4d of the Appendix.

From the above referenced testimony, it appears that the monitoring officers, except possibly Hunter, listened to virtually all personal conversations or were able to listen to them when they paid attention. The procedure violates *both* interpretations of *Scott*, *supra*, set forth by the Court of Appeals of Georgia in the *Morrow Case*, *supra*. It shows substantially a "blanket intercept" which qualifies as a "blatant violation" and it also demonstrates the second type violation of "an inadequate method or effort . . . utilized to minimize intercepts of non-pertinent calls." *Morrow*, *supra*, p. 406.

The testimony of the above officers more or less claims that there was less recording than interception. However, as *Scott*, *supra*, recognizes, the violation is in the improper interception.

Moreover, the violation was much more severe than the officers claimed. Petitioner's Motion contended that the *original* recordings themselves reflected "deliberate, substantial and massive failure to minimize".

The testimony of the Assistant District Attorney, who

prosecuted the case, supported Petitioner's contention with strong circumstantial evidence, as he was explaining the failure of the District Attorney's personnel to turn into the clerk the various cassette tapes and the reasons that he had reduced the original seven reel-to-reel tapes and nine cassette tapes to six or seven edited cassette tapes of excerpts to offer into evidence (T-192-194). His answers furnished the following circumstantial evidence of *recordation* of personal conversations: There were about 1704 recorded calls during the surveillance (T-194). He said: . . . "I thought it would be easier to find pertinent conversations if I put them onto a smaller number of cassettes . . . " He admitted that he left out "most" of the content of the original recordings in making his edited excerpts (T-194-195). He admitted that he deleted substantially over half of the originals (T-195). He selected the conversations that he was "interested in". (T-196)

His main purpose was to help himself better to present his case for the prosecution (T-199). In the editing process, he did not include a conversation of about an hour of a personal chat of Mr. Tookes and Ms. Dyer (T-202, 203); or a fairly lengthy conversation between them where Mr. Tookes' little girl is involved in the conversation (T-203); or lengthy conversations of "female sociable chit chat" between Ms. Dyer and other women (T-203) or a conversation of about twenty or thirty minutes where an attorney was talking with Mr. Tookes about some judgment that Mr. Tookes said did not apply to him (T-204). He testified that the cassettes recorded not only telephone conversations but background conversations in the monitoring room (T-204). He admitted that some of these cassettes recorded officers in the background talking and making comments about what was being monitored

(T-205). The Prosecutor further admitted that when he weeded out the substantial quantity of material in making the edited excerpts that he eliminated the material because it was irrelevant or cumulative and repetitive (T-206). Finally, the following transpired:

"Q. All right sir, . . . Now, could you estimate about what percentage of the material that was weeded out was considered by you to be irrelevant?

"A. No sir, there is no way I could do that.

"Q. Would it be fair to say that the amount of material you weeded out as irrelevant was a substantial quantity of the totality of the recordings?

"A. Yes, sir.

"Q. All right, sir." (T-207)

Counsel for Petitioner insisted that it was imperative for the trial judge to listen to all of the original recordings in order to make the necessary objective assessment on the minimization issue (T-524-526, 528, 529, 571, 613-615, 624). The trial judge said that "after these tapes are exhibited to the jury in the course of the case somewhere along, I may grant a mistrial because I think I have been led down a primrose path, or a verdict of 'not guilty' because I have been led down a primrose path, which the State cannot appeal as I understand it. But, I don't think, at this juncture, I need listen to all those tapes to make a determination in my own mind pursuant to the evidence I have heard as to whether or not they have been reasonable under the present circumstances". (T-624, 625)

Petitioner's Counsel then said that if the original tapes were put into evidence by the State on trial that the Court might could rule on the minimization issue but that if the State offered the edited excerpts, which he deemed

inadmissible there would be no opportunity for the Court to rule on lack of minimization as illustrated in the original tapes (T-625). When in the trial the State's exhibits were offered the Court allowed the edited excerpts to be admitted into evidence (T-1469, 1479, 1485), over objection, and to be played for the jury, rather than the originals (T-1577f).

Therefore, the trial court never listened to the original wiretap recordings and never made an objective assessment of whether or not there was minimization according to law.

The burden of proof on a motion to suppress seized evidence is upon the State, *Ga. Code Section 27-313, Liskey v. State*, 156 App. 45, 46 (1980); *Bland v. State*, 141 Ga. App. 858 (1977).

The officers admitted that they *intercepted* virtually all conversations. They claimed that their recordings were of pertinent calls and only so much of personal calls as were heard to determine their personal nature. Yet, most of this recorded content was weeded out by the District Attorney's edited excerpts, including long conversations of a purely personal nature. After indicating that sooner or later he would hear the original recordings to assess objectively the minimization question, the trial judge failed and refused to do so.

Therefore, the State failed to carry its burden of showing that the execution of the Investigation Warrant and Extension Warrant was constitutional and lawful. Therefore, it was harmful error for the trial court to deny Petitioner's Motion to Suppress on the grounds of illegal execution also.

Hence, the trial court, explicitly refused even to con-

sider the evidence necessary to make the objective assessment required by this Court in *Scott, supra,* and the Georgia Appellate Courts have condoned it.

3. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE FAILURE OF THE TRIAL COURT TO PROVIDE NOTICE OR HEARING WHEN A JUROR PRIVATELY TOLD THE JUDGE OF HIS BIAS AND REQUESTED RECONSIDERATION OF HIS QUALIFICATIONS AS A JUROR.

It is axiomatic that due process of law under the U.S. Constitution requires notice and hearing in regard to matters that affect the loss of one's liberty. *Hovey v. Elliott,* 167 U.S. 409, 416-420 (1897).

After Petitioner's appeal was filed to the Court of Appeals of Georgia, and the record was transmitted, it turned out that a written message was in the Record from a juror in the case to the trial judge, dated August 21, 1980, which was the third day of a three-week trial (R-88-89). In the message the juror suggested bias and requested reconsideration of his qualifications as a juror. The trial judge had not disclosed this fact to Petitioner, his Counsel, or to Petitioner's Counsel's knowledge, to anyone except by the surfacing of the document in the Record. The message is reflected on page 1e of the Appendix.

The Court of Appeals of Georgia erroneously assumed that the Court below *had informed Counsel* that a *juror* had expressed his concern about a *spectator.* There was absolutely no disclosure whatsoever to any Counsel for the Petitioner or any other Defendant that any *juror* had raised a question about anything. (Supp. T-1-7, 21, 23, 25-26). The Court of Appeals of Georgia further misconstrued the issue to be that of a juror's concern about a

spectator. Rather, the issue is that the juror expressed to the court *bias on his part*, apparently, toward one or more Defendants, and yet, the trial court neither informed Petitioner's Counsel nor allowed a hearing for the court to determine whether or not the juror should be disqualified.

The Georgia Law provides due process guidelines but the trial court ignored them and the Appellate Courts have failed to correct.

Upon the trial of a criminal case, the mind of every person chosen as a juror should at the time of his selection, with respect to the person and the particular matter under investigation, be, as between the State and the accused, in a condition of perfect neutrality; and though upon the voir dire they each do qualify as being thus impartial, a verdict of guilty may, nevertheless, be impeached by satisfactory proof that a single juror entered upon the discharge of his duties with a fixed and determined purpose, formed in advance of hearing the evidence, to convict the accused. *Myers v. State*, 97 Ga. 76 (2) (1895).

If a question of bias or prejudice arises, disqualification of the juror depends upon the nature and extent of his attitude. Disqualification of the rest of the panel or panels depends upon the extent of corruption of their attitudes by the biased or prejudiced juror.

The individual juror may be disqualified if it is established that his opinion is so fixed and definite that it would not be changed by the evidence. *Westbrook v. State*, 242 Ga. 151, 154, (3) (1978); *Sullens v. State*, 239 Ga. 766 (1) (1977).

Where a juror responded on voir dire that he had heard that the defendant was a peeping tom, "it was error for

the trial judge to proceed with the selection of the jury in the face of defense counsel's motion." *Lingerfelt v. State*, 147 App. 371, 372-374 (1) (1978).

Where a prospective juror in an arson case said that he had heard that the defendant was a "fire bug", it disqualified the juror and the panel, requiring reversal. *Moore v. State*, 156 App. 92 (1) (1980).

Obviously, if a fair determination were to be made, regarding whether or not Mr. Williams's explicit doubt about his impartiality was such as to disqualify him or the other jurors a hearing was necessary so that appropriate questions could be asked on the record. On the third day of this three-week trial, did the juror have any prejudice or bias resting on his mind either for or against the accused? *Ga. Code Sec. 59-806 (2)*. He indicated either or both in his note to the judge, which was undisclosed to Counsel. What was the extent of such bias or prejudice? We do not know. Was his mind perfectly impartial between the State and the accused? *Ga. Code Sec. 59-806(3)*. We do not know. What was the extent of his bias, prejudice or partiality? We do not know. Did he have an opinion so fixed and definite that it would not be changed by the evidence or charge of the court? We do not know. Did the juror discuss his bias, prejudice or partiality with the other jurors? We do not know. Regardless of whether he was able to set aside any preconceptions, did any comments by the juror contaminate the attitudes of other jurors? We do not know. We do not know the answer to these vital questions because there was no hearing. There was no hearing because the trial judge failed to give notice to any party or counsel that he had even received the note from the juror.

After Petitioner filed his original brief the trial judge gathered the attorneys for the defendants whose new trial

motions were still pending and Petitioner's Counsel. Supplemental transcript and record were made and are referred to herein as "Supp. T".

On the occasion, the trial judge expressed vagueness of recollection but admitted candidly that he had received the note from the juror via the courtroom deputy sheriff and decided that it had no bearing on the case and did nothing about it. (Supp. T-1-7)

Petitioner's Counsel stated in his place that no information whatsoever came to his attention regarding the note or its contents until after he had filed Notice of Appeal for Petitioner. (Supp. T-21-23)

Furthermore, Petitioner's Counsel moved the court to hold a hearing, subpoena the juror as the court's witness and allow him to be questioned as to the effect of what he observed and what he thought about the court's declination to act upon the issue of his impartiality. Counsel also moved the court to order the defendants to be brought in for the hearing. (Supp. T-25) The trial judge denied the motion. (Supp. T-26)

The supplemental transcript and record further reinforce Petitioner's contention that the trial court erred in denying Petitioner notice and hearing on the issue of bias by the juror. On the occasion of the making of the supplemental transcript and record the trial court compounded its error by continuing to deny a hearing.

Therefore, Petitioner's liberty was taken by a 20-year sentence, predicated upon a verdict by a jury which contained a member who, on the third day of a 3-week trial, privately expressed to the Judge, his bias toward the defense side and asked that his qualifications as a juror be reconsidered, and yet the Judge gave neither notice nor hearing to Petitioner. Petitioner has suffered a fla-

grant deprivation of liberty without fundamental due process of law.

4. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A GUILTY VERDICT BY A RATIONAL TRIER OF FACT.

Under Georgia Law it is reversible error for a trial court to refuse to direct a verdict of acquittal where there is absolutely no conflict in the evidence and the verdict of acquittal is demanded as a matter of law. *Ga. Code Ann.* 27-1802; *Merino, et al. v. State*, 230 Ga. 604(1) (1973); *Clay v. State*, 137 Ga. App. 169, 171 (2) (1976).

Petitioner was charged with "conspiring". The evidence did not show it. He was charged with "attempt". The evidence did not show it. He was charged with certain "overt acts". It was alleged that he maintained a building at 261 Elm Street. The only evidence was the Corporate Charter (State's Exhibit—40) which showed it as a residence in 1974 (T-2317). Petitioner explained that actually he had not lived there since 1969 (T-1894). It was alleged that he maintained two telephones at the address during the period of March 15, 1980 to May 1, 1980. The evidence failed to show this. It was alleged that Petitioner participated in three telephone calls. The other party in one of these calls was acquitted. The other party in a second call was acquitted of the indicted charge and found guilty of a lesser charge (T-2233). The calls where officers claimed to identify Petitioner's voice are substantially unintelligible. The full content of none was intelligible. The bits and pieces that the court reporter transcribed, were so devoid of context that no rational trier of fact who took seriously and conscientiously the presumption of innocence and reasonable doubt could find guilt from them beyond a reasonable doubt, under this

Court's standard in *Jackson v. Va.*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2nd 560 (1979).

Petitioner took the stand and explicitly denied and refuted the allegations (T-1868-1901).

Therefore, the trial court erred in refusing to direct a verdict of acquittal for Petitioner (T-1838, 40) and was erroneously affirmed in the light of *Jackson v. Va., supra,* because the minor premise, namely, the factual ingredient, was insufficient.

From another perspective, the major premise, namely, the law, was also insufficient, because *Georgia Code Section* 79-A-812, upon which the Indictment was based, does not define a crime.

Hence, on the basis of the facts and the law the *"Rational Trier of Fact Standard"* of *Jackson v. Va., supra,* was not met.

In summary it seems to Petitioner that the Georgia Courts have decided the above four federal questions in ways that are in shocking conflict with the cited applicable decisions of this Court. If this honorable Court chooses not to consider and correct these flagrant violations of Petitioner's rights under the 4th Amendment and the Due Process Clause of the 14th Amendment of our United States Constitution, then, who in this country can be protected from substantial violations of his privacy because of some anonymous criminal informant who uses conclusional labels of a sinister connotation without a factual basis? Who can be safe from tyrannical invasion of privacy by callous officers? Who can ever know when a trial judge is concealing the bias of a supposedly fair juror? Who can ever be assured that his presumption of innocence and the principle of reasonable doubt will be taken seriously?

CONCLUSION

For the reason aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the Court of Appeals of Georgia.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I, J. Melvin England, Attorney for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 17th day of December, 1981, I served three (3) copies of the foregoing Petition to the Supreme Court of the United States, for the Writ of Certiorari to the Court of Appeals of Georgia, upon counsel for the Respondent, the State of Georgia, by depositing the same in the United States Mail with proper postage thereon and addressed as follows:

Honorable Benjamin H. Oehlert, III
Asst. District Attorney
301 Fulton County Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30303

By: _____
J. MELVIN ENGLAND
Attorney for Petitioner

Suite 1220 Atlanta Center
Limited Bldg.
250 Piedmont Avenue, N.E.
Atlanta, Georgia 30303
Phone: (404) 659-1990

APPENDICES

APPENDIX A

Quillian, C. J., McMurray, P. J., Pope, J.

July 15, 1981

61495. TOOKES v. THE STATE. P-49

POPE, Judge.

Douglas Tookes brings this appeal from his conviction of conspiracy and attempt to violate the Georgia Controlled Substances Act, Code Ann. $ 79A-812. Appellant was sentenced to 20 years because of his participation in a scheme to sell heroin and cocaine by appointment to people who would call by telephone to arrange a drug purchase.

1. Pursant to the investigation a wiretap warrant and extension were issued on two telephones located in a house at 261 Elm Street, N.W., Atlanta, Georgia. Appellant argues that the information furnished as a basis for obtaining the warrant was not sufficient to establish probable cause and, therefore, the trial court erred in failing to suppress the recordings of conversations intercepted by use of the wiretaps. Probable cause is required for the invasion of a citizen's privacy by authority of a wiretap warrant. Code Ann. § 26-3004. "This standard of probable cause is the same as the standard for a regular search warrant." United States v. Fury, 554 F2d 522, 530 (2 Cir. 1977), cert. denied 433 U. S. 910.

The affidavit of an Atlanta police officer which was contained in the application for the warrant indicated that information had been received from a confidential informant regarding the drug operation. Appellant urges that the affidavit contained merely the conclusions of the informant concerning the illegal activity and did not

specifically indicate how the informant had reached those conclusions and, therefore, was invalid as a basis to establish probable cause under the standards set forth in Aguilar v. Texas, 378 U. S. 108, (84 SCt 1509, 12 LE2d 723) (1964) and Spinelli v. United States, 393 U. S. 410, (89 SC 584, 21 LE2d 637) (1969).

The reliability of the informant was established by the police officer's sworn statement that he had known the informant for 13 years and that the officer and other members of the narcotics squad had received and acted upon information provided by the informant in the past which had proved reliable in making arrests for drug violations. Also, sufficient basis for the informant's knowledge in the present case was indicated by the fact that the informant worked closely with the police in making a controlled purchase of narcotics. Compare State v. Gamage, 340 A2d 1, 16 (Maine 1975). The informant had told the officers that a drug trafficking operation was being run out of a house located at 261 Elm Street in Atlanta. The operators whom he named would not deal directly with drug buyers but would sell through "runners" who would place a telephone call to a particular number on the telephone at the house to set up a drug deal. The runner would then go to the house, pick up the drugs and deliver them to the customers who had to park out of sight of the house in order to be served. The informant, working with police detectives, contacted a runner. On each of three occasions the runner placed a telephone call and then walked to the Elm Street address and returned with heroin. This information was quite detailed and any risk of falsehood of the informant's story was sufficiently diminished by the police corroboration which in the present case was sufficient to establish

probable cause. Accord, Draper v. United States, 358 U. S. 307, (79 SCt 329, 3 LE2d 327) (1959). Therefore, an extended evaluation of the underlying circumstances supporting informant's conclusions as to illegal activity is unnecessary because the subsequent corroboration lends credence to the informant's information. Further, the dates upon which the informant and officers had made the purchases were entered in the affidavit showing that the information was current and not stale. *Morrow v. State*, 147 Ga. App. 395 (249 SE2d 110) (1978).

2. The appellant contends the trial court erred in denying his motion to suppress wiretap evidence because of the failure of the monitoring officers to minimize interception and recordation of private conversations as required in accordance with the provisions of the warrant. As this court noted in *Morrow v. State*, 147 Ga. App. 395, 407 (249 SE2d 110) (1978), " '(t)he proper approach for evaluating compliance with the minimization requirement . . . is objectively to assess the agent's or officer's actions in light of the facts and circumstances confronting him at the time without regard to his underlying intent or motive.' " In the instant case eight officers monitored both telephones over the forty day period authorized by the warrants. Two of the officers were sergeants in charge of supervising the operation. They instructed the other officers to record only drug-related calls and to minimize their interception of impertinent or personal calls.

Tape recorders were set up for each phone and a visual meter was activated when a call was received on that particular line. The officers upon seeing the meter register would turn on the recorders and turn up the volume of the monitors in order to listen to the conversation to deter-

mine if the call related to the illegal drug operation. If the call was drug-related, the officers would continue to record it. If not, they would turn off the recorder and turn down the volume on the monitor so they could not hear the conversation.

During the execution of the warrant it was determined by the officers that the telephones had a call forwarding capability whereby a call placed to one telephone would be automatically transferred to the other line. The telephones also had a feature that notified the person in the house of other incoming calls. An audible "click" indicated that someone else had dialed the number or had been forwarded to that number from the other line. This system allowed the callers on the line to be put on hold so that other callers could be spoken to without the previous caller having to hang up. The visual meter on the wiretapping equipment did not indicate when this subsequent call would come in on a single line; therefore, after the officers determined the special capabilities of the system, they monitored the phone calls in order to receive subsequent calls. The officers would turn the volume down on their listening equipment if a call was not drug-related so that the content of the conversation was inaudible but loud enough so that they could hear the tone indicating the receipt of another call. We consider this procedure utilized by officers acceptable to minimize the calls intercepted and therefore find this enumeration to be without merit.

3. The trial court allowed the playing of excerpts made by the district attorney of the original wiretap recordings. The originals contained approximately 1740 telephone calls on seven reel-to-reel tapes and nine cassette tapes. Appellant contends that these edited copies of the

original tapes were not properly authenticated and should have been excluded from evidence.

In the present case the original tapes were shown to have been recorded on reel-to-reel and cassette tape recorders. Testimony indicated that officers were capable of operating the machines and that the tapes were authentic recordings of the intercepted telephone conversations and have not been altered. The chain of custody was satisfactorily explained and it was shown that the recorded testimony was obtained by a wiretap and was not coerced in any fashion. The only element lacking in order to provide a proper foundation allowing presentation of the original recordings to the jury was the identification of the speakers. *Solomen, Inc. v. Edgar*, 92 Ga. App. 207(3) (88 SE2d 167) (1955). However, these original recordings were not played for the jury. Instead, the original tapes were tendered into evidence to support the authenticity of the edited copies. The district attorney under oath testified that he made the edited copies and that these copies were accurate representations of the original recordings. The speakers whose voices were recorded on these edited copies were identified to the jury at the time the edited tapes were played. For this reason we deem that the foundation was proper for the admission of the original recordings and that the playing of the edited tapes in order to aide the presentation of evidence to the jury was not error. Moreover, the original tapes were provided to appellant's counsel prior to trial and, having been introduced into evidence, were available so that the accuracy of the edited tapes could have been checked; they were also available for cross examination purposes. Compare *Bible v. Somers Construction Co.*, 197 Ga. 761 (30 SE2d 623) (1944). The tapes were properly admitted

and not subject to exclusion for any other reasons enumerated by appellant.

4. Appellant contends that the indictment joined the two separate and distinct offenses of conspiracy and attempt and is therefore defective. The wording of the indictment charged the accused with the offense of violating the provisions of the "Georgia Controlled Substances Act 79A-812 (Attempt and Conspiracy)." The fact that the words "attempt" and "conspiracy" were included in the indictment set off the parenthesis did not constitute the charging of two separate offenses. These words merely identified by title that particular code section. From the plain wording of the indictment which stated that the appellant and others "did conspire" to commit certain unlawful acts, it is clear that appellant was charged only with the offense of conspiracy.

5. The denial of appellant's motion for severance of his trial from the co-conspirators was not error. In order to mandate the severance of trials it must be demonstrated that harm resulted from the failure to sever. *Price v. State*, 155 Ga. App. 206 (270 SE2d 203) (1980). Appellant argues that he was unable to cross-examine his co-conspirator who refused to take the stand, in order to attempt to prove by her testimony that his was not the voice which officers identified on the wiretap recordings as talking to the co-conspirators and talking on the phone at the Elm Street house where the co-conspirator lived. However, because this co-conspirator did not testify, there was no greater possibility of harm resulting here, where appellant could not cross examine her, than would have resulted if separate trials had been held and the co-conspirator had invoked her Fifth Amendment right by refusing to testify. The other two defendants

who did testify, as did appellant, denied all participation by appellant which was, consistent with his defense.

6. Appellant claims that since the informant participated in the instant case, he was a decoy and his identity should have been revealed. The informant did work with police when they made three drug purchases while attempting to verify the information he had given them. However, the informant's participation ended there. There is no indication that he was a participant or witnessed any activities of the crime of conspiracy other than the act of a co-conspirator selling drugs. This is the only activity to which his testimony would have been admissible. The appellant does not specifically indicate why disclosure of the informant's identity would benefit him. "Where the disclosure of the informant's identity would at most serve only to furnish possible testimony, impeaching the officer's testimony disclosure of the informant's identity is not required." *Black v. State*, 154 Ga. App. 441, 442 (268 SE2d 724) (1980); *Paras v. State*, 247 Ga. 75 (3) (SE2d) (1981).

7. The corporate charter indicating appellant's address as 261 Elm Street in 1975 was admissible to contradict his statement that he had no connection with that address since 1968 or 1969. Code Ann. § 38-1803.

8. Appellant's next enumeration concerns the sufficiency of the evidence concerning appellant's participation in the crime. "Conspiracy consists in a corrupt agreement between two or more persons to do an unlawful act, the existence of which agreement must be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose." *Fincher v. State*, 211 Ga. 89 (4) (84

SE2d 88) (1954). "It is . . . necessary that the identity and participation of the appellant be established by corroboration independent of the accomplice's testimony. . . . 'Slight evidence from an extraneous source identifying the accused as a participator in the criminal act will be sufficient corroboration of the accomplice to support a verdict.' " *Ham v. State,* 140 Ga. App. 592, 594 (231 SE2d 414) (1976).

There was independent corroborating evidence in the present case that officers observed the premises and made various drug purchases. The appellant was seen at the location and recorded statements indicated that he conducted drug transfers over the telephone located at the Elm Street address. The recording also indicated that he had discussed various aspects of the operation with his co-conspirators. This sufficiently connected him with the illegal operation so as to establish an inference of his involvement in the conspiracy.

Appellant also argues that evidence by the co-conspirators in regard to him should have been ruled out. He contends that the state did not show a prima facie case of conspiracy involving him before such evidence was admitted. We conclude this was not error because a conspiracy is shown by the evidence as a whole. *Anglin v. State,* 243 Ga. 720, 724 (256 SE2d 455) (1979). We therefore conclude from an examination of the record that the evidence was sufficient for a rational trier of fact to have found appellant guilty beyond a reasonable doubt. *Smith v. State,* 154 Ga. App. 497 (2) (268 SE2d 714) (1980).

9. Appellant finally enumerates that a juror became concerned about the attendance of a spectator at the trial. The juror recognized the spectator and knew he was involved in illicit drugs. According to a bailiff who was

examined under oath subsequent to the trial, the juror expressed concern to a bailiff that the judge should be informed of these facts since the spectator's participation in the trial might affect his impartiality. The bailiff relayed the information to the judge who told the bailiff to have the juror write a note to the judge. The exact contents of the note, which were entered into the record of the case, were apparently not disclosed to counsel for the state or appellant; however, both were called to the judge's office and informed by the judge that the juror had expressed his concern about the spectator. Both counsel informed the judge that the spectator was not a witness in the case, and the juror was so informed by the bailiff. We are not persuaded that the judge abused his discretion at the time of the trial by taking no further action, nor subsequent to the conviction by refusing to have a full hearing on the matter at defense counsel's request. Compare United States v. Burke, 496 F2d 373 (5th Cir. 1974).

Judgment affirmed. Quillian, C. J., and McMurray, P. J., concur.

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, July 31, 1981

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

61495 Douglas J. Tookes et al v. The State

Upon consideration of the motions for a rehearing filed in this case, it is ordered that they be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA, July 31, 1981

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ ALTON HAWK, CLERK.

CLERK'S OFFICE

SUPREME COURT OF GEORGIA

Atlanta, October 8, 1981

Case No. 37997. Tookes v. The State

The Supreme Court today denied the writ of certiorari in this case.

JORDAN, C.J., HILL, P.J., MARSHALL, CLARKE, SMITH & GREGORY, JJ., CONCUR.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

CLERK'S OFFICE

SUPREME COURT OF GEORGIA

Atlanta, October 20, 1981

DEAR SIR:

The motion for a reconsideration was denied today: Case No. 37997. Tookes v. State

All the Justices concur, except Weltner, J. not participating.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, November 6, 1981

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

61495. Douglas J. Tookes et al. v. The State

Whereas, attorney for appellant in the above styled case has filed notice of intention to certiorari said case to the United States Supreme Court;

It is ordered that the remittitur in this case be stayed pending an application to the Supreme Court of the United States for the writ of certiorari;

Now, therefore, it is hereby ordered that simultaneously with the filing of the petition for certiorari, counsel shall certify to this Court that such petition has been filed with the United States Supreme Court.

COURT OF APPEALS OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA, November 6, 1981

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ ALTON HAWK, CLERK

APPENDIX B

GEORGIA }
FULTON COUNTY }

AFFIDAVIT OF LAW ENFORCEMENT OFFICER IN SUPPORT OF APPLICATION FOR INVESTIGATIVE WARRANT

Personally before the undersigned officer authorized to administer oaths, comes Sergeant W.E. WOOD, who, being first duly sworn on oath deposes and says that he is Sergeant W.E. WOOD of the Atlanta Bureau of Police Services, and that he is authorized to investigate violations of the Georgia Controlled Substances Act.

Affiant further states that he has been a member of the Atlanta Police Department for seventeen (17) years, and that he has specialized in investigating violations of the Georgia Controlled Substances Act for the past ten (10) years. Affiant was assigned to the Drug Enforcement Administration Task Force for four (4) years and to the Metro Drug Squad for four (4) years. Affiant is presently with the Atlanta City Narcotics Squad.

Affiant further states he is familiar with the various schemes and enterprises devised to conduct illegal sales of drugs in the greater Metropolitan Atlanta area. He states that he has been involved in numerous investigations concerning illegal drug activity and that he not only knows the organizational structure of such enterprises, but is also familiar with the paraphernalia which is commonly used in the operation of drug traffic.

1. BASIS FOR PROBABLE CAUSE

Affiant states that he has received information from a confidential and reliable informant that EMMA LOU

SMITH, LARRY THOMAS, DOUGLAS JEROME TOOKES, MARGARET GAIL WISE, a/k/a Margaret Wise Bennett, STEPHANEY DYER and other unknown persons are engaged in an illegal drug trafficking operation, in violation of the Georgia Controlled Substances Act.

A. RELIABILITY OF INFORMANT

Your Affiant states that he has known the said informant for thirteen (13) years, and that this informant has previously given Affiant reliable information which has resulted in arrests.

Affiant further states that the information received from the said informant in the past has proved reliable, in that Affiant, as well as other members of the Narcotics Squad of the Bureau of Police Services in Atlanta, acting on the said informant's information, have been able to make buys of heroin and cocaine, and have been able to discover significant drug operations, and have, by personal observation, verified information given by the said informant.

Your Affiant has had numerous occasions to speak with said confidential informant and to question said informant concerning said informant's knowledge of illegal drug activity in the Metropolitan Atlanta area. Your Affiant states that this confidential informant is familiar with, and knows and understands the organization of illegal drug activity in the Metropolitan Atlanta area, as well as being familiar with, and recognizing, due to his experience, the various paraphernalia used in illegal drug traffic.

B. INFORMATION FROM RELIABLE INFORMANT

Your Affiant states the the said confidential informant

told your Affiant that a person known as DOUGLAS JEROME TOOKES a/k/a Doug Tookes, runs a "drug house". This house is located at 261 Elm Street, N.W., Atlanta, Fulton County, Georgia, and is a one-story brown brick duplex with yellow trim. This informant told your Affiant that Doug Tookes deals out of the house at 261 Elm Street, N.W., but that he deals only to his "runners". This informant told your Affiant that Tookes does not live in the house at 261 Elm Street, N.W., but that Stephaney Dyer lives there and also sells drugs from that location.

The said informant told your Affiant that unless the potential drug buyer parks his car out of sight of the house at 261 Elm Street, N.W., Tookes will not sell the drugs.

The said informant has told your Affiant that Margaret Gail Wise is one of Doug Tookes' "runners".

The said informant told your Affiant that Margaret Wise told him that the phone number called by her to set up drug buys was 588-1396 and that that phone was at 261 Elm Street, N.W. The informant said that there was another phone number at 261 Elm Street, N.W., also.

The said informant told your Affiant that Tookes goes to New York to buy drugs and that he delivers the drugs to 261 Elm Street, N.W.

C. PHYSICAL SURVEILLANCE

Your Affiant states that Douglas Jerome Tookes has been known to be dealing in illegal drugs since 1972 or 1973.

Your Affiant states that on November 13, 1978, Officer W. R. Carter of the Atlanta Bureau of Police Services, met one of Doug Tookes' "Runners" on Elm Street for

the purpose of buying heroin. The runner made a phone call and then directed Officer Carter to Thurmond and Elm Street and told him to park his car. Officer Carter gave the runner $50.00 for the heroin and $5.00 for her buying it and she walked away and returned about three minutes later with a $50.00 bag of heroin.

Your Affiant states that on November 29, 1978, Officer Carter met a runner for the purpose of buying heroin. The runner told Officer Carter he could get some from "Doug" but that he had to call first. The runner made a phone call and then told the officer it would cost $50.00 plus $7.00 for him. The runner directed Officer Carter to park his car at Thurmond and Sunset. The runner then went toward 261 Elm Street. He returned five minutes later with a $50.00 bag of heroin.

Your Affiant states that on January 1, 1980, Detective J.C. Holloway of the Atlanta Bureau of Police Services and the aforementioned confidential informant met Margaret Gail Wise, a/k/a Bennett, for the purpose of buying heroin. Margaret Wise made a phone call to one of the phones at 261 Elm Street. Detective Holloway, the confidential informant, and Margaret Wise drove to Thurmond and Vine Street and parked. Margaret Wise walked to 261 Elm Street, N.W. and went into the house with $50 provided by Detective Holloway, and returned with $50.00 worth of heroin.

Your Affiant states that on February 4, 1980, Detective C.H. Hunter and Sergeant H.H. Carson ran a tag check on an automobile parked in front of 261 Elm Street, N.W. and found that it had an improper tag. An occupant of the car told the officers that the car belonged to Doug Tookes. The Officers had seen Tookes start to leave the house at 261 Elm Street, but when Tookes saw the

Officer's car, he went back inside. Officer Carson went to the door (locked burglar bar door) of 261 Elm Street N.W. and called for Tookes. Tookes appeared but refused to come outside. Tookes admitted that the automobile was his and told the officers to go ahead and impound the car.

Your Affiant states that on February 21, 1980, the aforesaid confidential informant met Margaret Wise for the purpose of buying heroin. Wise made a phone call in the informant's presence in regard to purchasing a $50.00 bag of heroin. The informant and Wise drove to the corner of Thurmond and Elm Streets and parked the car. The informant gave Wise $60.00. Wise walked to 261 Elm Street, N.W., knocked, and went in. A few minutes later she returned with a glassine bag of suspected heroin.

Your Affiant states that on March 18, 1980, Detective Holloway and the aforesaid confidential informant met Margaret Wise for the purpose of purchasing heroin. Wise told the informant that she had made the call to 261 Elm Street. Detective Holloway, the informant, and Wise drove to Thurmond Street and Wise got out of the car with $50.00 given to her by Detective Holloway and walked to Elm Street. Wise returned to the car with a bag of suspected heroin.

Your Affiant has information that Douglas Tookes owns Mid-Town Auto Sales. Cars registered to Mid-Town Auto Sales are often seen both at 261 Elm Street, N.W., and at Doug Tookes' residence at 2594 Williamsburg Drive, Decatur, Georgia.

Your Affiant has found through normal investigative techniques that the phone number 588-1396 is an unpublished number and is listed to an Emma Lou Smith at 261 Elm Street, N.W. A second number at that address

is 523-5375 and that number is listed to a Larry Thomas. The toll records of these two phones show calls to common numbers out of town; specifically, in October, 1979, calls on both phones were made to a number (404) 549-1851) in Athens, Ga. and on November 27 and 29, 1979, calls on both phones were made to (212) 677-6669 in New York City. The phone number in New York City was found to be listed to an S. Santana and your Affiant has information that the Santana family in New York is known to traffic in heroin. The number called in Athens, Ga. was found to be a public telephone in a service station.

Your Affiant states that on March 31, 1978, a search warrant was executed at 1615 Hasty Place, N.W., the then residence of Douglas Tookes. The officer seized contraband, including marijuana and drug paraphernalia. Also seized was a 1974 phone bill for Emma Lou Smith at 261 Elm Street, N.W., Atlanta, Ga., phone number 523-0332.

Your Affiant states that violations of the drug laws of Georgia involve consenting parties. Due to that fact, rarely are any overt complaints made to the police. The police must rely on information received from informants. This information must be confidential; and the identity of the informant must remain confidential. Otherwise, the police, and in this instance, your Affiant's credibility with the confidential informant would be lost, thereby destroying a source of information with which to investigate violations of the drug laws of Georgia. That is why your deponent has not named the aforesaid confidential informant. Further, should this affidavit become known, and the informant's participation in this investigation exposed, and the informant's identity made known, then

the informant's life would be endangered.

II. NON-APPLICABILITY OF NORMAL INVESTIGATIVE TECHNIQUES

Affiant believes that normal investigative techniques in this case would not be successful for the following reasons: Drug trafficking involves a hierarchy consisting of different individuals of different ranks and status in the organization. It is a conspiratorial type organization. Many individuals are involved to varying degrees. The subjects who are the subjects of surveillance, EMMA LOU SMITH, LARRY THOMAS, DOUGLAS JEROME TOOKES, MARGARET WISE and STEPHANEY DYER, are merely some of the hierarch in the drug-trafficking organization. Affiant also knows from his past experience in working drug cases that, in many instances, the records obtained over the telephone are the only records that indicate the tying in with the individual whose telephone is being tapped and his superiors and/or counterparts in the drug trafficking organization. The purpose of electronic surveillance is to determine to what extent and scope the individual whose telephone would be surveilled is involved in the drug trafficking organization. It is my experience, based upon drug investigations which I have conducted in the past, that the full extent of the conspiracy cannot be obtained by normal investigative techniques. The degree of involvement of subjects EMMA LOU SMITH, LARRY THOMAS, DOUGLAS JEROME TOOKES, MARGARET WISE and STEPHANEY DYER and the other individuals of various degrees of criminal involvement in the drug trafficking organization cannot be determined without this electronic surveillance. Through my personal experience and the experience of other detectives in the Bureau of Police

Services, who have worked drug cases, I also know that the records seized in drug raids generally have not been sufficient to establish the total hierarchy of the organization, but only serve to indicate the one, or at the maximum, a few individuals' participation in the drug trafficking scheme. The confidential informant referred to in this Affidavit is unwilling and afraid to testify since he is in fear of his personal safety if he does testify.

Because of the secrecy with which persons engaged in illegal drug trafficking, and specifically EMMA LOU SMITH, LARRY THOMAS, DOUGLAS JEROME TOOKES, STEPHANEY DYER and MARGARET WISE conduct such unlawful enterprises, investigative procedures now being employed are not reasonably likely to produce any further information concerning violations of the Georgia Controlled Substances Act.

From his physical surveillance of the location, 261 Elm Street, N.W., and from the description of that location given by the confidential and reliable informant, which location is the drug trafficking headquarters operated by Doug Tookes and where the telephone instruments (404) 588-1396 and (404) 523-5375 are located, Affiant has determined that said location is a one-story duplex. There is one front entrance to the duplex which has a locked burglar bar door. Doug Tookes will not come out of the house when police officers are outside and officers have failed in attempts to arrest him. Doug Tookes will deal only with his runners when they come to the house after they have made a phone call to the house and he will not deal when he sees a car parked outside. Affiant has been told by the aforesaid confidential informant that a bucket of acid is kept at 261 Elm Street, N.W. in which the drugs will be dumped in the event a search warrant is

executed. There are windows overlooking the street and yard. Any effort to execute a search warrant would be detected, and the evidence sought would be destroyed before access to the location was gained. Doug Tookes does not live at 261 Elm Street, N.W. so a wiretap is the only means by which sufficient evidence about the drug trafficking operation can be obtained.

III. TELEPHONE INFORMATION

After receiving the foregoing information from the aforesaid confidential and reliable informant, your affiant contacted Southern Bell Telephone and Telegraph Co. and learned the following:

Telephone (404) 588-1396 is listed to EMMA LOU SMITH of 261 Elm Street, N.W., Atlanta, Fulton County, and that service began on that telephone on October 13, 1973, according to Southern Bell Telephone Company.

Telephone (404) 523-5375 is listed to LARRY THOMAS, 261 Elm Street, N.W., Atlanta, Fulton County, Georgia, and that service began on that telephone on July 7, 1972, according to Southern Bell Telephone Company.

Your Affiant does not know whether EMMA LOU SMITH and LARRY THOMAS are real or fictitious persons. However, he has information that STEPHENEY DYER lives at said house and he has seen DOUG TOOKES there.

IV. CONCLUSION

Based on the aforesaid information, your affiant believes that the said EMMA LOU SMITH, LARRY THOMAS, DOUGLAS JEROME TOOKES, STEPH-

ANEY DYER and MARGARET WISE have committed and are committing crimes involved in violation of the Georgia Controlled Substances Act, to wit: Violation of the Criminal Code of Georgia, Section 79A-801, et seq.

Based on the physical surveillance, informant's telephone calls, and affiant's previous experience, it is affiant's opinion that 261 Elm Street, N.W., Atlanta, Fulton County, Georgia, and telephone numbers (404) 588-1396, (404) 523-5375, are being utilized as headquarters for the trafficking of drugs.

Surveillance, as indicated previously, has been conducted but has not furnished sufficient evidence to prosecute and connect all individuals who are involved in this drug trafficking organization. Informant has told affiant who has previously stated in the affidavit, that subject DOUGLAS JEROME TOOKES is operating a drug trafficking organization and that the said Tookes is not the only individual that is involved in the drug trafficking operation, and that there are other individuals who are involved in this operation. One of the purposes of this investigation is to root out those who were ultimately responsible for setting up, opersting, and maintaining this drug trafficking organization. The only way to locate these individuals is through the use of electronic surveillance and at the same time the individuals whose telephone is being surveilled, their total involvement in the illegal drug trafficking operatipn will be discovered.

Your affiant makes this Affidavit for the information of Lewis Slaton, District Attorney of the Atlanta Judicial Circuit, to be annexed as an exhibit to his Petition for Investigation Warrant to intercept, overhear, and record conversations between DOUGLAS JEROME TOOKES and other persons using telephone instruments Nos. (404)

588-1396 and (404) 523-5375 for illegal drug trafficking activities in violation of the Georgia Controlled Substances Act because:

(a) other investigative procedures have been tried and failed;

(b) because of the secrecy with which said persons conduct such unlawful enterprises other investigative procedures reasonably appear unlikely to succeed;

(c) because of the nature of the criminal enterprises involved, other investigative procedures reasonably appear too dangerous to law enforcement personnel to be utilized, in that the employment of normal investigative techniques by such personnel could result in death or injury.

/s/ W. E. WOOD

W.E. WOOD, Sgt. Atlanta Police Bureau

Sworn to and subscribed before me
this 21st day of March, 1980.

APPENDIX C

GEORGIA
FULTON COUNTY

AFFIDAVIT OF LAW ENFORCEMENT OFFICER IN SUPPORT OF APPLICATION FOR INVESTIGATIVE WARRANT

Personally before the undersigned officer authorized to administer oaths, comes Sergeant W.E. WOOD, who, being first duly sworn on oath deposes and says that he is Sergeant W.E. WOOD of the Atlanta Bureau of Police Services, and that he is authorized to investi-gate viola tions of the Georgia Controlled Substances Act.

Affiant further states that he has been a member of the Atlanta Police Department for seventeen (17) years, and that he has specialized in investigating violations of the Georgia Controlled Substances Act for the past ten (10) years. Affiant was assigned to the Drug Enforcement Administration Task Force for four (4) years and to the Metro Drug Squad for four (4) years. Affiant is presently with the Atlanta City Narcotics Squad.

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1. BASIS FOR PROBABLE CAUSE

Affiant states that he has received information from a confidential and reliable informant that

A. RELIABILITY OF INFORMANT

Your Affiant states that he has known the said informant for thirteen (13) years, and that this informant has previously given Affiant reliable information which has resulted in arrests.

Affiant further states that the information received from the said informant in the past has proved reliable,

B. INFORMATION FROM RELIABLE INFORMANT

This house is located at 261 Elm Street, N.W., Atlanta, Fulton County, Georgia, and is a one-story brown brick duplex with yellow trim.

This informant told your Affiant that Tookes does not live in the house at 261 Elm Street, N.W.,

The said informant told your Affiant that Margaret Wise told him that the phone number called by her to set up drug buys was 588-1396 and that that phone was at 261 Elm Street, N.W. The informant said that there was another phone number at 261 Elm Street, N.W., also.

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Surveillance, as indicated previously, has been conducted but has not furnished sufficient evidence to prosecute and connect all individuals who are involved in this drug trafficking organization.

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APPENDIX D

MATERIAL EXCERPTS OF TESTIMONY ON MINIMIZATION ISSUE

In the instant case the surveillance officers testified with considerable confusion and contradiction about the minimization issue. Detective Tumlin testified in essence: No attempt was made to avoid intercepting any calls that did come through the monitoring equipment because one of the recorders was not functioning properly (T-21). Initially, they monitored "drug related calls" but when calls started coming in on one phone they were instructed to monitor all calls (T-225). He was not sure whether the problem was in the equipment or the phones (T-225). For about 38 of the 40 days all calls were monitored but only "drug related" conversations were recorded (T-239).

Detective Hunter testified in essence: The monitoring system was on all the time. The pen register would indicate a call and he would manually turn up the volume of the monitor to intercept and listen (T-275). Throughout the surveillance when he heard personal calls he ceased to record (T-276). He also ceased listening (T-277). He did not have to keep listening to personal calls to hear a new call because the latter would cause an audible "click" (T-278). He developed this system the first day (T-279).

Detective Roland testified in essence: He supposed that he could have begun to monitor on the signal by the pen register without listening to all of the calls (T-347). On personal calls he would turn the volume down but could listen if he paid attention. If he heard a "beep" he would know that another call was coming in and would listen (T-348). If a call was in progress and a second call came

in, he could still hear a "beep" (T-349). He would cut off the recorder on calls which in his opinion were personal calls (T-350, 351).

Sgt. Wood, one of the two supervising detectives, testified in essence: He believed that a call would turn the pen register on even if all the monitoring and recording equipment was off (T-423). The equipment worked properly on both lines from March 26 to April 10 (T-425). He does not recall furnishing information to the issuing Judge about any technical trouble when the Extension Warrant was obtained on April 10. Regarding his minimization instructions he testified: "A. They were told that personal calls and all were not to be monitored and so on.

"Q. Were they told not to monitor them or not to record them?

"A. Well, monitor and record but they would have to use their discretion on what was, you, about the personal calls and also that due to the lines, the phones and all, that they would have to monitor them probably to find out if, in fact, if there were any other calls due to the set up of the phones. That is, the transferring of one phone to the other or the hold pattern and so on." (T-427, 428)

The following questions and answers occurred shortly thereafter:

"Q. All right, sir. Then when the call came to the 588 number and that pen register signalled that it was doing so and then the call was immediately forwarded automatically to the 523 number, would the pen register on the 523 also become activated and record that number was receiving a call?

"A. Yes, sir.

"Q. All right, sir. All right, sir, Thank you. I appreciate you clarifying that; nobody has been able to so far.

All right, sir. Now Mr. Wood, do I understand that your instructions to the people who were working under your supervision was to listen to all calls that came through but only to record the calls that were not personal?

"A. Yes, sir. The instructions I stated earlier. I told them that they would probably miss or there is a good possibility they could miss the calls. The only way we could tell to get all phone calls and all would be to monitor most of the calls. If it was obviously personal and all and we didn't want to record it or anything, I think most of the guys would, at the time, cut it down and cut down the volume on it.

As I stated earlier, we would turn it up louder to make sure we got it recorded distinctly because the incoming caller at all times was not as clear as the caller at the house or the home station, I guess you would say.

"Q. All right, sir. Then do I understand that the instructions were not to—the instructions were to listen to everything that came through but only record the relevant things?

"A. The business calls, yes, sir.

"Q. All right, sir. (T-431-432)

Sgt. Carson, the other supervising detective, testified as follows:

"Q. Did you say your instructions were to not record or, if possible, not monitor personal calls?

"A. After it was determined it was a personal call, right, sir.

"Q. Now, what sort of directions did you give as to how it would be possible not to monitor personal calls?

"A. Well, based on the way the phone system operates, as we were told, you would have to monitor the calls

to make sure there is no in-coming calls on either one of the phones as a low tone so you could still hear the beep if an in-coming call was coming in on the line.

"Q. All right, sir. What method did you instruct your people to follow, just turn the volume down?

"A. Basically that's all you could do to listen to the in-coming call on the other line.

"Q. Was it your instructions that when a call appeared to be personal, they were to turn the volume down to where they could still hear but that it wasn't as loud as it would normally be?

"A. Yes, sir.

"Q. The volume it was turned down to, was that such as where if one paid attention to it, you could still hear?

"A. Yes, sir, I'm sure you could. (T-492, 493)"

APPENDIX E

August 21, 1980

A-51002

To Judge Fryer

In line with the procedure outlined by you in the Courtroom on 8/20/80 for raising issues or questions to be considered by you in reference to this case of which I was selected to serve as a juror, I have a matter which I feel of significance which I would like to address to you.

I am not familiar with any of the defendants, however, during the course of the afternoon, August 20, 1980 while Jury members were being selected, a Mr. Melvin Frazier, better known as "Iron Head" came into the courtroom. I do not know what interest Mr. Frazier has in this case, however, I do know and have known Mr. Frazier for sometime. I would suspect that Mr. Frazier has more than just a passing interest in this case, particularly because I have knowledge of some of Mr. Frazier's past activities with a Drug problem.

In view of this fact, and with the possibility of Mr. Frazier being called as a witness as well as other potential witnesses being called that I might recognize or be familiar with, it would be difficult for me to be as objective as I feel that I should be in this case. I am therefore requesting reconsideration of my position as juror in this case.

/s/ Robert Madison Williams

[Filed in Office, Sept. 15, 1980, Martha Nolan, Deputy Clerk Superior Court, Fulton County, Georgia.]

GEORGIA, FULTON COUNTY,

I, do certify that the within and foregoing is a true, complete and correct copy of the original in said case, as appears by the original on file and of record in the office of C erk of Fulton Superior Court, Criminal Division, Atlanta, Ga.

Witness my hand and the seal of said Court this the 31st day of October, 1980.

/s/ WILLIAM R. KIMSEY
DEPUTY CLERK